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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1117

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST,

Petitioners,

versus

FRANK ZARB, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST,

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PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TO: THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners ("Condor") respectfully seek a writ of certiorari to review the judgment and opinion in this case of the Temporary Emergency Court of Appeals of the United States.

I. OPINIONS OF THE COURTS BELOW.

The trial court, the United States District Court for the Western District of Texas, by document that might be considered an unreported opinion, granted to Condor a preliminary injunction to prevent enforcement of Federal Energy Administration Remedial Order requiring Condor to sell certain crude oil production to Phillips Petroleum Company (the Preliminary Injunction is appended hereto as Appendix "A"). The trial court subsequently certified a substantial constitutional question to the Temporary Emergency Court of Appeals which is also unpublished (Appendix "B" appended hereto). The opinion of the Temporary Emergency Court of Appeals is reproduced as Appendix "C" hereto and is reported in ____ F. 2d ____.

II. JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed, reproduced as Appendix "D" hereto, was entered on February 7, 1975. The statutory provision believed to confer on this Court jurisdiction to review the judgment is Section 1254 of Title 28, United States Code, as it has been incorporated by reference in Section 211(g) of the Economic Stabilization Act of 1970, Public Law 91-151, 83 Stat. 377, as amended by Public Law 92-210, 85 Stat. 743, and by Public Law 93-28, 87 Stat. 27, which, in turn, is incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Public Law 93-159, 87 Stat. 627.

III. QUESTION PRESENTED.

Whether the Congress of the United States, pursuant to the Emergency Petroleum Allocation Act of 1973, and the Federal Energy Administration and its Administrator, pursuant to Regulation 211.63 adopted under the Act, have the power and right, under the Fifth Amendment to the Constitution of the United States, to require an owner of property, Condor Operating Company, to sell its property to another, Phillips Petroleum Corporation, for the benefit and to the financial advantage of Phillips. (As certified to the Temporary Emergency Court of Appeals by the trial court).

IV. THE CONSTITUTIONAL PROVISION INVOLVED AND THE REGULATION UNDER ATTACK.

1. The Constitutional Provision: The Due Process Clause of the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ., *nor be deprived of life, liberty or property, without due process of law*; . . .

2. The Regulation Under Attack: Federal Energy Administration Regulation Section 211.63(a) of Title 10, Code of Federal Regulations, 39 FR 35472, October 1, 1974:

All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program: provided, however, that (1) any such supplier/purchaser relationship may be terminated by the mutual consent of both parties; (2) the provisions of this paragraph do not apply to the first sale of crude oil pursuant to Section 210.32 of this chapter [exempt "stripper well" oil]; and (3) the provisions of this paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser.

V. STATEMENT OF THE CASE.

The trial court's jurisdiction of this case is conferred by Section 211 of the Economic Stabilization Act of 1970, as incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973.

Petitioners own oil and gas leases covering undivided interests in lands in Ector County, Texas, with two other parties, one of which is Phillips Petroleum Company ("Phillips"). Condor is is the operator under longstanding Operating Agreements to which Phillips is a party and which allow the owners at any time to take their respective shares of oil in kind. At December 1, 1973, Condor, as operator, was selling all

of the production from the property to Phillips. After December 1, 1973, Condor began to take its share of production in kind to refine the same in the United States into petroleum products which it marketed to ultimate users in the United States, in compliance with the price control laws applicable thereto. Condor's crude oil is a fairly unique "lube" crude which under Federal Energy Administration price controls, on first sale, may be sold for not more than $5.28 per barrel. According to the advice of Phillips in the record, replacement oil of this type would cost $12.25 per barrel f.o.b. United States Gulf Coast. Federal Energy Administration cited Condor for thus taking and using its owned crude oil as a violation of its Regulation 211.63(a). After administrative hearings, Federal Energy Administration issued its remedial order that:

> "Condor shall supply Phillips with the volumes of crude oil Phillips was receiving under contract on December 1, 1973. This shall be interpreted to mean that any exercise by Condor of its contractual option to take in kind the volumes Phillips was purchasing on December 1, 1973, would not be effective to divert the flow of crude oil from Phillips under Section 211.63."

Condor has exhausted fully the administrative remedies available to it to attack the remedial order, and thereby this case became one for the judicial review of the remedial order.

VI. REASONS FOR GRANTING THE WRIT.

Regulation 211.63(a) positively forces some private owners of privately owned property, including Petitioners, to sell that privately owned property to other private persons, against their will and without in any way allowing the owner to keep, or use, or otherwise enjoy the same, or any part thereof. This is beyond the powers, expressed or implied, delegated to legislative and executive branches of American government, state or federal, as has been proclaimed, time and again, by the courts, including this Court. In the cases, the offenders have been States, their subdivisions and arms thereof, such as utilities, which, from time to time, cast covetous eyes on the property of others. Through all of our historical crises, and all of our wartime material shortage and allocation programs, the United States never before has attempted to ignore these limitations on its power. The first federal effort in this direction is that of Respondents' in the adoption of regulations under the Emergency Petroleum Allocation Act of 1973, and in the enforcement of the same against Petitioners. Now, for the first time, the United States has a clear scheme of regulation that directly forces sales of privately owned property to other private citizens, against the will of the owner. Perhaps it is even more profound that the United States adopts a scheme of regulation which commands private citizens what, when and on what terms private citizens positively will act with their private property. Historically, schemes of regulation of private citizens extended only to limiting, restricting or prohibiting conduct, while otherwise leaving the citizens free to make their own choices.

The Temporary Emergency Court of Appeals, in adopting the Regulation under attack, clearly implies that since 1937, under the rulings of this Court, the implied powers of government over the private property of private citizens are great enough to force the unwilling to sell their private property to other private citizens, and that somehow, since 1937, the authorities to the contrary have become inoperative. The court below also saw no substantive difference between policelike power to tell citizens what they cannot and must not do with their property, and power positively to order citizens to do this, that or the other with their property. The Emergency Court of Appeals in its opinion has further expressed the belief that an otherwise constitutionally protected right of one person in respect of his property may be subordinated to the great national purposes, at least if an emergency is declared by Congress, or for a relatively short period of time.

None of these concepts comport with our constitutional law as it has been written to date. The issues raised affect Petitioners and various other independent oil producers, and if resolved in favor of the existence of the disputed power, may be anticipated to affect various others who from time to time may become subject to this type of Regulation.

VII. ARGUMENT.

Cases of this Court holding that under the due process clause of the Fourteenth Amendment to the Constitution, the legislative and executive branches of government may not require one private citizen to

sell his privately owned property against his will to another private citizen include: *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); *Missouri Pacific R. Co. v. Nebraska*, 217 U.S. 196 (1910); *Great Northern R. Co. v. Minnesota*, 238 U.S. 340 (1915); *Great Northern R. Co. v. Cahill*, 253 U.S. 71 (1920); *Delaware L. & W. R. Co. v. Morristown*, 276 U.S. 182 (1928); *Chicago St. P. M. & O. R. Co. v. Holmberg*, 282 U.S. 162 (1930); *Citizens Savings and Loan Association v. Topeka*, 20 Wall. 655 (1875); *Cole v. La Grange*, 113 U.S. 1 (1885); *Myles Salt Co. v. Ibernia & St. M. Drainage District*, 239 U.S. 478 (1916); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937); *Lake Shore and Michigan Southern Railway Company v. Smith*, 173 U.S. 684 (1899); *Ochoa v. Hernandez E. Morales*, 230 U.S. 139 (1913); *Eubank v. Richmond*, 226 U.S. 137 (1912); *Fallbrook Irr. District v. Bradley*, 164 U.S. 112 (1896); *Murray v. Hoboken Land, etc., Co.*, 18 How. 272 (1856); and *Wilkinson v. Leland*, 2 Pet. 627 (1829). Please see also *16 Am. Jur., Constitutional Law*, Section 544, p. 935 (12 C.J., Constitutional Law, Section 1042, p. 1252; 16 C.J.S., Constitutional Law, Section 209, p. 1048, et seq.; and 16 C.J.S., Constitutional Law, Section 599, p. 695, et seq.). The effect of the Fifth Amendment of the Constitution to limit the modes of exercising power by the federal government should be the same. The power of the judicial branch of government to afford adequate remedies at law or in equity, of course, stands on a different power base. Likewise, the power of government over governmental agencies, officials and employees, and over arms or extensions of government, such as government owned corporations, common carriers, and utilities, may be different from power over private citizens and their private property.

In the Temporary Emergency Court of Appeals. Respondents conceded, correctly, that the power underlying the adoption of Regulation 211.63(a) does not stem from the implied power of eminent domain. The reason for this concession may have been that Petitioners are forced to sell their oil at $5.28 per barrel, at a time when replacement oil would cost $12.25 per barrel.

Petitioners have conceded that were they going to sell their oil, they could probably be lawfully restricted by regulation to selling it to their historical purchaser. Petitioners would also concede that Federal Energy Administration, by regulation, can restrict or limit the uses which owners may make of their property, the quantities they could produce, the quantities they could refine, the quantities they could sell, the minimum quality standards they must meet if they are to sell, and under price controls, either the minimum or maximum price at which they might sell. Petitioners also concede that there are probably innumerable other things that the government, by regulation, could tell them they could not do with their property, as long as the owners are left some substantial freedom to otherwise use and enjoy it.

Petitioners do not challenge, and in the courts below have not challenged, the federal power to abrogate contracts.

In the court below, Respondents' claim of constitutional power rested on a concept that the national government may do whatever is needful for the great national purposes that identify this country's adjust-

ment to change and ultimate survival, citing Judge Leventhal in his opinion in *Amalgamated Meat Cutters and Butchers Workers v. Connally*, 337 F. Supp. 737, 752 (U.S. D.C. D.C., 1971), aff'd 497 F. 2d 1360 (TECA. 1974), writing on the subject of undue delegation of legislative authority in relation to the Economic Stabilization Act of 1970, Pub. L. 91-151, 83 Stat. 377.

Petitioners recognize that in 1937, this Court, in some respects, altered its prevailing view concerning the scope of the commerce clause of the Constitution, to authorize, in effect, federal legislation in fields that formerly had been held by this Court to be subject only to state regulation. Nothing of which we are aware, however, happened in 1937, or has happened since, which would materially lessen the extent of protection afforded by the Fifth Amendment to persons in their ownership of private property, as was thought by the Temporary Emergency Court of Appeals. Likewise, we are aware of nothing that enlarges the means and modes available to the government to exercise powers delegated to it in the Constitution. It is only since 1937, perhaps, that Petitioners' activities would have been thought to be lawfully subject to federal regulation.

The power to regulate commerce among the States is not a power to do anything the government, or an agency or official thereof, might choose to do, at least not since the adoption of the Bill of Rights as amendments to the Constitution. With the Bill of Rights, everything done in the regulation of commerce must comport with due process of law as guaranteed by the Fifth Amendment.

Due process of law has been historically measured by this Court, case by case, and, as a consequence, there is no precise definition or measure of due process. Looming large in the due process decisions are ideas about what is and what is not traditional and accepted practice, expressed thoughts of our founding fathers, historical developments in our country, as well as in others, thoughts about freedom and free men, the evils of other governmental systems, the beliefs in what a free people would and would not delegate to government and what they consequently did and did not so delegate, and beliefs in what a free people would and would not tolerate in government, among other considerations.

By whatever it is that due process of law may be measured, this Court has never held that it is consistent with due process of law for either the legislative or executive branches of government to compel one private citizen to sell his privately owned property to another private citizen against his will, or, otherwise to compel private citizens affirmatively to act with respect to their privately owned property precisely as the government says that they will. Throughout our history, in the exercise of police and policelike powers, government has proscribed, prohibited and restricted the acts of the people, but never have the executive and legislative branches been allowed lawfully to command and to dictate that which private citizens will do with their lives and property. It is one thing to make it unlawful for a person to do various things, while otherwise leaving him free to do that which is not unlawful, and another to command action without leaving the recipient any choice in the matter.

Even in wartime and under war powers, when faced with the threat of destruction of our very national existence by forces from without, and with the most severe and critical material shortages at hand, the government never took it upon itself to order private citizens to act in any particular way, though the temptation to do so must surely have been strong on several occasions. The reason that it did not, we submit, is because the Bill of Rights would have rendered such actions unlawful, and the independent judiciary would have promptly stricken the same.

The Temporary Emergency Court of Appeals thought that *Block v. Hirsch*, 256 U.S. 135 (1921), which was uncited by any party in the courts below, controls these issues. The *Block* case legislation involved was a District of Columbia temporary emergency rent control law adopted after World War I. The legislation specifically allowed the owner of rent property to retake if for his own use or for that of his wife, children or dependents. Otherwise, it allowed tenants to hold over after the expiration of their leases on paying the maximum rent permitted by law. Petitioners, on the other hand, are being forced to sell and forever dispose of their oil to another private person. Petitioners are not being restricted merely in the use to which they may put their oil. On complying with the regulation and remedial order issued thereunder, Petitioners' oil is gone forever.

The *Block* decision is certainly to be considered along with the due process cases that have heretofore been decided, but it does not and should not be considered as controlling, overriding, or overruling the

cases holding there to be no lawful power to force a private citizen to sell his privately owned property to another private citizen, such as those hereinabove cited by Petitioners. Three of these cited cases post-date the *Block* decision. In one of the later cases, *Delaware L. & W. R. Co. v. Morristown*, 276 U.S. 182 (1928), Mr. Justice Holmes and Mr. Justice Brandeis, both of whom were in the majority in the *Block* decision, in a concurring opinion, expressly recognized the validity of the rule for which Petitioners contend. Mr. Justice Holmes and Mr. Justice Brandeis were also members of the unanimous Court deciding *Chicago St. P. M. & O. R. Co. v. Holmberg*, 282 U.S. 162 (1930). The third case, *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), was also decided by a unanimous Court, which included Mr. Justice Brandeis.

The matter of legislation by prohibition and restriction versus affirmative governmental demand, as submitted, has formed the basis for upholding or denying price control laws, material allocation laws, collective bargaining, minimum wage controls, railroad car assignment regulations, and other legislation, both before and since 1937. Valid legislation and regulation on these subjects, and others, were merely inhibitory and prohibitory and not affirmative and in some of the cases, these were said to be critical distinctions. See for example *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1, 30, 45 (1937), and the *Assigned Car Cases*, 274 U.S. 564, 573, 575 (1927), opinion by Mr. Justice Brandeis, for a unanimous Court which included Mr. Justice Holmes. The significance of these distinctions did not disappear from constitutional jurisprudence when Mr. Chief Justice Hughes altered his views about the com-

merce clause in 1937 or when Mr. Justice VanDeventer retired in 1937, or by virtue of any decisions of the courts since that time.

Petitioners recognize that under valid governmental regulations, some people may be more adversely affected than others, and that such does not necessarily render the regulation invalid. This is not to say, however, that a regulation may lawfully defeat a constitutionally protected right of a person, no matter how otherwise perfect or desirable the scheme of regulation, as the Temporary Emergency Court of Appeals implies. If one's rights guaranteed by the Bill of Rights are infringed by the regulation, the regulation is unenforceable, at least as it would so infringe upon constitutionally protected rights of the offended person. It is not a problem of balancing the national good against the relative unimportance of a constitutionally protected right of a single citizen or a small group of citizens, to determine which will survive. Were it not so, there would be no practical constitutional guarantees, because initially, at least, the greater public good always could be said to outweigh the effect of violation of the constitutionally protected rights of one person or but a relatively few persons. Especially is this so when legislative acts and executive regulations are clothed with the aura and mantle of perfection with which the courts and private citizens cannot be expected to cope.

The Temporary Emergency Court of Appeals thought it important that Congress had declared an emergency, and that the emergency legislation was initially to be effective for but a term of months, suggesting that constitutionally protected guarantees

become subservient to the greater public good during emergencies or for relatively short periods of time. This thought is contrary to the Bill of Rights and the reasons for its existence and the reasons for its content, and is not supported by any actual court holdings of which we are aware.

The Emergency Petroleum Allocation Act of 1973 does not itself compel private citizens to sell their private property against their will to another private citizen. The forced sale of private property stems strictly from regulations such as Section 211.63(a). Even that regulation is salvageable if it is interpreted to mean that it applies only to those who choose to sell production. There are undoubtedly many producers who have no desire to use their production themselves and who are going to sell it in any event. In that case, as Mr. Justice Holmes suggests in the *Block* case, there probably is no constitutional impediment to restricting eligible purchasers to the historical purchaser, if the historical purchaser is willing to buy it.

Even were the entire regulation section to be declared invalid because of its encroachment on constitutionally protected rights, such would not prevent FEA from performing the full functions delegated to it by Congress in the Emergency Petroleum Allocation Act of 1973. Under the Act, FEA has available to it the whole range of permissible modes of regulation, including those employed during World War I and World War II, under our most extensive allocation acts adopted under the war power enactments. FEA has no mandate from Congress to adopt rules or regulations which depart from the traditional and accepted modes of regulation. FEA has no command from Congress to

pioneer new concepts in how to go about the business of regulating. FEA can still get its job done in just the way that Congress and the agencies of government found that they could get the job done in the 1930's, by means of prohibitions, inhibitions, and limitations, rather than by affirmative dictation. It can achieve its great aims as well as it otherwise could without destroying the ideals that, under the Bill of Rights, we are a free people possessed of sacred rights to own and enjoy private property, including the right to sell it to other private citizens only when the owner may choose to do so.

CONCLUSION

FEA (FEO), on its own motion, has broken with historical and traditional concepts of how the power to regulate lawfully may be effected to embark on a program of forced sales of private property to other private citizens against the will of the owners thereof. This, and its necessary implications, deserves the very careful scrutiny of this Court, and we submit, after full consideration, the Court's repudiation.

Respectfully submitted.

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